IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
August 7, 2001 Session

STATE OF TENNESSEE v. ALAN LAWRENCE ADLER

Direct Appeal from the Criminal Court for Fayette County
No. 4945 Jon Kerry Blackwood, Judge

No. W2001-00178-CCA-R3-CD - Filed August 29, 2001

The petitioner was indicted for aggravated child neglect of a child under six years of age, a Class A felony. Following a trial, a Fayette County jury convicted him of the lesser offense of reckless endangerment, a Class A misdemeanor. The petitioner, pursuant to Tenn. Code Ann. § 40-32-101, petitioned for the destruction of the public records concerning his arrest and prosecution for the felony charge on which he was acquitted. The trial court ordered that all records relating to the petitioner's arrest and prosecution be expunged, except those records relating to reckless endangerment. In this appeal, the state argues the petitioner was not entitled to expungement since he was convicted of a lesser-included offense. The petitioner argues this court is without jurisdiction to hear the state's appeal as a matter of right; the trial court properly ordered expungement; and the trial court erroneously charged reckless endangerment as a lesser-included offense of aggravated child neglect. After a thorough review of the record, we conclude (1) the state appeal as of right is properly before this court; (2) records relating to the petitioner's arrest and prosecution are not subject to expungement; and (3) petitioner may not collaterally attack his conviction on a lesser offense in an expungement action. Accordingly, we reverse the trial court's order of expungement.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed; Remanded

JOE G. RILEY, J., delivered the opinion of the court, in which DAVID G. HAYES and ALAN E. GLENN, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Kim R. Helper, Assistant Attorney General; Elizabeth T. Rice, District Attorney General; and Ryan D. Brown, Assistant District Attorney General, for the appellant, State of Tennessee.

Robert L. Hutton, Memphis, Tennessee, for the appellee, Alan Lawrence Adler.

OPINION

I. JURISDICTION

The petitioner alleges that this court may review this appeal only as a petition for writ of certiorari. The petitioner specifically argues that the state's authority to appeal as a matter of right is limited to instances specifically provided in Tenn. R. App. P. 3(c), which states:

> In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b) governs the appellate court's jurisdiction of a direct appeal initiated by a defendant in a criminal case:

> In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved with the consent of the state and the trial court the right to appeal a certified question of law dispositive of the action, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Neither of the above provisions expressly grants a petitioner or the state the right to appeal an expungement matter. This court has held that the state cannot appeal as of right the trial court's unilateral decision to reduce the sentence in a negotiated plea agreement. State v. Leath, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998). The court noted that none of the Tenn. R. App. P. 3(c) provisions applied; nevertheless, the court treated the appeal as a petition for writ of certiorari. *Id.* However, this court has interpreted Tenn. R. App. P. 3(b) to allow a petitioner an appeal as of right from a trial court's order denying the expungement of records. *See* State v. McCary, 815 S.W.2d 220, 221 (Tenn. Crim. App. 1991). McCary is more closely in point than Leath. Although McCary concerned a petitioner's, not the state's, appeal as a matter of right, "what is good for the goose is

good for the gander." Accordingly, we treat the appeal as one of right pursuant to Tenn. R. App. P. 3(c).

II. DESTRUCTION OF RECORDS

The issue of whether the expungement statute applies when a person is acquitted of the indicted offense, but convicted of a lesser-included offense, is not specifically addressed by the statute. The controlling statute provides:

> All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury or a conviction which has by appeal been reversed, and all public records of a person who was arrested and released without being charged, shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person. . . .

Tenn. Code Ann. § 40-32-101(a)(1).

The petitioner argues that this statute requires the trial court to destroy all records that pertain to the petitioner's arrest and prosecution, except those relating to the lesser misdemeanor offense. In support of his argument, the petitioner relies upon Eslick v. State, 942 S.W.2d 559, 560 (Tenn. Crim. App. 1996); State v. Liddle, 929 S.W.2d 415 (Tenn. Crim. App. 1996); and McCary, 815 S.W.2d at 221. The state relies upon State v. John Wayne Slate, C.C.A. No. 03C01-9511-CC-00352, 1996 WL 596948, at *2 (Tenn. Crim. App. filed October 18, 1996, at Knoxville), *perm. to app. denied* (Tenn. 1997).

In McCary, the petitioner was charged in three separate indictments. The petitioner pled guilty to one of the indictments, and the trial court dismissed the remaining two indictments upon the state's motion. This court held that the trial court had no discretion in determining whether the records of the dismissed indictments should be destroyed and ordered the destruction of such records. McCary, 815 S.W.2d at 222.

In Eslick, the petitioner was charged in a multiple-count single indictment, but he was convicted of only one count. The petitioner filed a motion to expunge the records of the counts on which he was acquitted. We held the trial court improperly denied his motion for expungement; however, we noted that if it were impossible to redact information related to the acquitted counts without destroying information related to the convicted counts, then expungement would be improper. Eslick, 942 S.W.2d at 560.

In Liddle, the petitioner pled guilty to one count of a six count indictment. The petitioner then sought to have the records of the remaining five counts destroyed, which was denied by the trial

court. On appeal, this court held the trial court erred by refusing to order expungement on the five "charges" that were dismissed. Liddle, 929 S.W.2d at 415.

The Slate court encountered a different situation from the aforementioned cases. In Slate, the petitioner was indicted and convicted of first degree murder. On appeal, this court reduced the petitioner's conviction to second degree murder. The petitioner then petitioned for expungement of the records relating to his first degree murder prosecution, which was denied by the trial court. This court upheld the trial court's ruling stating that "[t]he expunction statute appears to provide relief only in situations where . . . criminal charges fail to result in any conviction." Slate, 1996 WL 596948, at *2. We conclude that the Slate rationale controls the case *sub judice*.

The petitioner argues the instant situation differs from Slate because the petitioner in Slate was originally convicted by the jury of the greater offense, while the petitioner in the instant case was acquitted of the greater offense that he seeks to expunge. However, in each of the petitioner's proffered cases, this court ordered expungement in a situation where the petitioner was either acquitted of the charged offense, or the charged offense was dismissed. The petitioner does not cite us authority, nor do we find any, where the expungement statute was applied when the petitioner was acquitted of the indicted offense but convicted of a lesser-included offense. Therefore, the trial court erred in ordering expungement.

We are sympathetic with petitioner's argument that he was charged with a stigmatizing Class A felony but only convicted of a lesser-included misdemeanor offense. However, we are unable to distinguish Slate. We, therefore, conclude that this matter is more appropriately addressed to the legislature, which has the ability, if it so desires, to amend the statute to cover a situation like the one presented in this appeal.

III. LESSER-INCLUDED OFFENSE

The petitioner attempts to collaterally attack his conviction of reckless endangerment, contending it is not a lesser-included offense of aggravated child neglect. The petitioner did not seek a direct appeal of his conviction, nor has he attacked the conviction by habeas corpus or post-conviction relief. A facially valid judgment in a court with proper jurisdiction cannot be collaterally attacked except by authorized routes of attack. State v. McClintock, 732 S.W.2d 268, 271 (Tenn. 1987). The expungement statute is predicated upon a prior dismissal, no true bill, not guilty verdict, or appellate reversal of the conviction. *See* Tenn. Code Ann. § 40-32-101(a)(1). A collateral attack on a conviction via a petition for expungement is not an authorized route of collateral attack. Furthermore, the petition for expungement does not allege this as a basis for expungement, and there is no indication in the record that the matter was ever raised in the trial court. Petitioner's argument lacks merit.

CONCLUSION

Based on the foregoing, we conclude that (1) the state may appeal as a matter of right an order for the expungement of records; (2) expungement of records is not available when the petitioner is convicted of a lesser-included offense and is seeking to expunge a greater charged offense; and (3) a petitioner may not collaterally attack a conviction in an expungement action. The judgment of the trial court is reversed, and the case is remanded for entry of an order consistent with this opinion.

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JOE G. RILEY, JUDGE